

**AMENDMENTS TO THE DRAWINGS**

The attached Replacement Sheet includes changes to Figure 4. This Replacement Sheet replaces the original sheet including Figure 5.

Attachment: One (1) Replacement Sheet

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**REMARKS**

Claims 1, 3, 4 and 8-10 are pending in this application. Claim 1 is the sole independent claim. By this Amendment, claims 2, 6 and 7 are cancelled without prejudice or disclaimer. Claims 1, 3, 4 and 8 are amended and new claims 9 and 10 are added. Support for new claims 9 and 10 may be found at least at page 2, line 3 of the specification and Fig. 1. Thus, no new matter is added.

**Information Disclosure Statement**

An Information Disclosure Statement was filed on January 20, 2011. Applicant respectfully requests acknowledgement of receipt and consideration of the references listed therein.

**Drawings**

The drawings are objected to under 37 CFR 1.83(a) because they fail to show the bonded foil bent downward as described in the specification and claims. Fig. 4 is amended to show the foil described in the claims. Support for the amendment may be found at least in claims 4, 7 and 8, as well as in the paragraph beginning at page 2, line 22 of the specification. Thus, no new matter is added.

**Specification**

The abstract is objected to because it contains the phrase "the present invention relates to." The title of the invention is objected to as not being descriptive.

The abstract is replaced with a Substitute Abstract that complies with 37 CFR §1.72. As such, withdrawal of the objection is requested.

The specification is also amended to include reference number 15 used to identify the "foil" of claims 4, 7 and 8.

**Claim Objections**

Claims 2-4 and 6-8 are objected to because the preambles of the claims are not consistent with the independent claims from which they depend.

The claims are amended in a manner believed to overcome the objections. As such, withdrawal of the objections is requested.

**Rejections Under 35 U.S.C. §112**

Claims 2-4 and 6-8 are rejected under 35 U.S.C. §112, second paragraph, as being indefinite. This rejection is respectfully traversed.

The claims are amended to overcome the antecedence issues. As such, withdrawal of the rejections is requested.

**Rejections Under 35 U.S.C. §103**

Claims 1-3 and 6 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent 4,165,815 to Vetter ("Vetter"). This rejection is respectfully traversed.

In rejecting the claims, it is alleged that Vetter discloses all of the claim features except for "a hinged joint with end pins which are snapped into corresponding recesses in the bottom lid." Although it is admitted that Vetter fails to disclose such a feature, it is alleged that it would have been obvious to one of skill in the art at the time of the invention to provide the cosmetic container of Vetter with a hinge having the claimed structure rather than the hinge actually used by Vetter "since the examiner takes Official Notice of the equivalence of hinges with pins and corresponding recesses and tether hinges for their use in the closure art...".

Applicant respectfully reminds the Examiner that "Official notice without documentary evidence to support an examiner's conclusion is permissible only in some circumstances. The notice of facts beyond the record which may be taken by the

examiner must be capable of such instant and unquestionable demonstration as to defy dispute.<sup>1</sup>

Moreover, if official notice is taken of a fact, unsupported by documentary evidence, the technical line of reasoning underlying a decision to take such notice must be clear and unmistakable. If such notice is taken, the basis for such reasoning must be set forth explicitly. The examiner must provide specific factual findings predicated on sound technical and scientific reasoning to support his or her conclusion of common knowledge.<sup>2</sup> The applicant should be presented with the explicit basis on which the examiner regards the matter as subject to official notice so as to adequately traverse the rejection in the next reply after the Office action in which the common knowledge statement was made.

In the present case, no specific factual findings and no explicit basis were provided. Rather, it is merely stated in the Office Action that the Examiner takes Official Notice of the equivalence of hinges with pins and corresponding recesses and tether hinges and that such hinges are known alternatives for a joint structure for a lid. As such, the requirements set forth by the courts and the MPEP for taking official notice without documentary support have not been complied with. Therefore, the rejection should be withdrawn.

Further, Applicant submits that it would not necessarily be obvious to use a tether hinge as disclosed in Vetter with the hinge joint as claimed. For example, Vetter has a tether hinge on the lid 14 to cover the inner recess 19. The inner recess 19 is described by Vetter as being used to store a dampened sponge so that a user may wipe her finger after applying make-up. Thus, Vetter selects a tether hinge to cover the recess 19. In contrast, the hinge joint of the present claims is selected to

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<sup>1</sup> *In re Ahlert*, 424 F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970).

<sup>2</sup> See *Soli*, 317 F.2d at 946, 37 USPQ at 801; *Chevenard*, 139 F.2d at 713, 60 USPQ at 241

moveably secure the cover lid 3 to the bottom lid 2. The cover lid 2 encloses the first enclosed space 11 to seal used snuff in the space. Because Vetter is storing a dampened sponge (rather than a powdered material) there is no need to use a hinged joint with end pins which are snapped into corresponding recesses to provide a tight unit. In other words, one of skill in the art would select the hinge required for the intended use. In Vetter a robust and stable connection is not required to enclose the sponge and therefore the less robust and less table tether hinge is used.

Moreover, a tether hinge as in Vetter (see Fig. 2) will often protrude from the body of the container. In such cases it is easy for the tether hinge to be inadvertently opened allowing the contents to be spilled. Although having the lid 14 of Vetter to be inadvertently opened may not be a problem, certainly having the lid 3 of the present claims opened to allow used snuff to spill out would be unwanted. Thus, taking office notice of the equivalence of tether hinges and a hinge joint with end pins and corresponding recesses in a bottom lid is improper at least without documentary evidence. Therefore, it would not have been obvious to one of skill in the art to replace the tether hinge with a hinge joint as claimed.<sup>3</sup>

In addition, claim 1 is amended to recite that "the cover lid is held fast in a closed position by a snap-fit tab, which interacts with a corresponding snap-fit part on the bottom lid and the bottom lid forms a tight unit." In contrast, there is no disclosure in Vetter of the bottom lid (12) forming a tight unit due to interaction with the cover lid (14) due to a snap-fit tab on the lid 14 and a snap-fit part on the lid 12. As discussed above, the inner recess 19 merely houses a dampened sponge. Thus, there is nothing in Vetter to suggest a tight unit is needed.

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<sup>3</sup> If Applicant challenges a factual assertion as not properly officially noticed or not properly based upon common knowledge, the Examiner must support the finding with adequate evidence (MPEP §2144.03).

Further, the use of the tether hinge 15 in Vetter suggests that a tight unit is not needed or sought. A tether hinge will not provide a tight unit as described in the claims as amended. Because Vetter fails to disclose or suggest each of the claim features, withdrawal of the rejection is requested.

Claims 4, 7 and 8 are rejected under 35 U.S.C. §103(a) as being unpatentable over Vetter in view of U.S. Patent 6,006,937 to Baravaglio et al. ("Baravaglio"). This rejection is respectfully traversed.

In rejecting the claims, it is alleged that it would have been obvious to one of skill in the art at the time of the present invention to modify the make-up container of Vetter to include a sealing foil as allegedly taught by Baravaglio to protect the container contents prior to first use.

Applicant submits that, according to Vetter, the "upper and lower case 12 could be threadably engaged in a sealable fashion to prevent the escape of cosmetic product." As Vetter already seals the cosmetic protect in the lower case, it is at best unclear why one of skill in the art would seek to modify the protect to include the sealing cover of Baravaglio thereby providing redundancy to the product while unnecessarily increasing costs in manufacturing the product. Because Vetter already discloses a sealing cover, there is no rational basis for modifying the cosmetic case of Vetter as proposed in the Office Action, withdrawal of the rejection is requested.<sup>4</sup>

Moreover, the sealing cover of Baravaglio cannot be "bent downwards, leaving the necessary room for the space that is defined by the bottom lid and the cover lid." According to Baravaglio, the cover is a sealing cover made of a rigid aluminum disk (p. 3, lines 62-67). Thus, were the cosmetic case of Vetter modified according to the

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<sup>4</sup> A rejection for obviousness must include "articulated reasoning with some rational underpinning to support the legal conclusion." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

teachings of Baravaglio, there would not be room in the inner container 22 for the inner recess 19 to fit into due to the rigid disk. As such, there is no rational basis for modifying the cosmetic case of Vetter as proposed in the Office Action. Therefore, the combination of references fails to render the claims obvious.

Further, even were the proposed combination made, such a modification would also then require additional modification to the case of Vetter and/or the disk of Baravaglio. As such, the combination of references is not obvious.

### **New Claims**

None of the applied art, whether considered alone or in combination, disclose or suggest that recesses are countersunk into the bottom lid, as in claim 9 or that a snap-fit tab and a hinged joint are within an outer peripheral edge of the bottom lid when the cover lid is in the closed position, as in claim 10.

### **CONCLUSION**

Accordingly, in view of the above amendments and remarks, reconsideration of the objections and rejections and allowance of each of the pending claims in connection with the present application is earnestly solicited.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact the undersigned at the telephone number below.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 08-0750 for any additional fees required under 37 C.F.R. § 1.16 or under 37 C.F.R. §1.17; particularly, extension of time fees.

Respectfully submitted,

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By



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